No. 3444.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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EMMA F. RUMSEY,

*Appellant,*

*vs.*

NEW YORK LIFE INSURANCE COMPANY, AND BENSON, SMITH & COMPANY, LIMITED,

*Appellees.*

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# BRIEF AND ARGUMENT FOR APPELLANT.

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UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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LORRIN A. ANDREWS,
W. B. PITTMAN,
*Attorneys for Appellant.*

T. J. O'DONNELL
(Denver, Colorado),
*Of Counsel.*

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## BRIEF AND ARGUMENT FOR APPELLANT.

### Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the Territory of Hawaii reversing a judgment, in equity, of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii (Honorable C. W. Ashford, Judge) in favor of appellant.

The action was brought by the appellant to recover the proceeds of a policy of life insurance on the life of her husband.

The corporate character and business of the appellee, the New York Life Insurance Company of New York, is so well known that it is unnecessary to state it. The

Appellee, Benson, Smith & Co., Ltd., a Hawaiian corporation, is, and at the time of all the occurrences involved in this controversy was, engaged in the drug business at Honolulu. We shall hereinafter refer to the respondents, respectively, as the Insurance Company and the Drug Company.

The controversy is over the proceeds of a policy of insurance issued by the Insurance Company on the life of appellant's husband.

The husband, Samuel L. Rumsey, formerly a resident of Honolulu, died on the 27th day of July, 1910.

The Insurance Company admits that the policy was in force at the time of the death of the insured—the only question is whether the widow or the Drug Company is entitled to the proceeds.

The Drug Company is, and at all the times in the bill mentioned was, incorporated for the purposes only of "buying, selling, dealing in and manufacturing drugs, "medicines and other commodities pertaining to said "line of business."

The policy on the life of the husband, Samuel L. Rumsey, bears date June 11th, 1903. It was applied for at Honolulu and was delivered on or about July 22nd, 1903, to George W. Smith of the Drug Company.

The Drug Company under the name and style of "the firm of Benson, Smith & Co., Ltd." is named as beneficiary, subject, however, to the following reservation:

> "CHANGE OF BENEFICIARY. The insured, having reserved the right, may change the beneficiary or beneficiaries at any time during the continuance of this policy by written notice to

> the Company at the home office, providing this policy is not then assigned * * * no * * * change of beneficiary * * * shall take effect until endorsed on this policy by the Company at the home office".

The health of appellant's husband became impaired shortly after the date of the issuance of the policy, and because of this he was compelled to and did cease active connection with the business of the Drug Company. In January following (1904), Mr. Rumsey left Hawaii and he was never again actively connected with the Drug Company or its business. He never returned to Hawaii.

The case was tried on an agreed statement of facts, from which it appears:

On the eleventh of June, 1903, one, George W. Smith, and one, Alexis J. Gignoux, together with the appellant's deceased husband, Samuel L. Rumsey, were officers, directors and stockholders of the Drug Company, Smith being the President, Rumsey the Treasurer and Gignoux the Secretary thereof. The total capital stock of the Company was five hundred (500) shares of the par value of one hundred dollars ($100) each, held as follows:

> George W. Smith, 363 shares or $36,500
> Samuel L. Rumsey, 100 shares or $10,000
> Alexis J. Gignoux, 30 shares or $3,000

and seven (7) shares divided between several other employees of the Company.

On the day last named one Purdy was a special agent of the Insurance Company, authorized only to

solicit applications for insurance in the Territory of Hawaii, under certain designated conditions and compensated for his services by a commission on the first premiums on policies, the applications for which were solicited by him. Smith was not only the largest stockholder of the Drug Company, but absolutely dominated the same. At the solicitation of Purdy, Smith determined to insure his own life in favor of the Drug Company, in the sum of five thousand dollars ($5,000), and *to require both Rumsey and Gignoux* to make an application for a policy each for $5,000 in favor of the corporation. Applications were made accordingly, and policies later issued, and the policy on which this suit is based thus passed into the possession of the corporation.

Rumsey drew a salary from the Drug Company, while engaged in its service, of Two hundred and fifty dollars ($250) per month. This salary was continued until October, 1904. He resigned as Treasurer in February, 1905.

The appellant and the insured married at Denver, Colorado, in August, 1905. Shortly thereafter, Rumsey gave notice to the Drug Company of his intention to substitute his wife as beneficiary in the insurance policy. The record does not disclose that any objection was made to such change at that time. In 1907, Rumsey agreed with Smith, who, as already stated, controlled the Drug Company, to sell his stock to the Company. During the course of the correspondence on this subject, Smith himself suggested to Rumsey, the terms on which his wife should be substituted as beneficiary and stated that three annual premiums of Two hun-

dred, thirty-two dollars and thirty cents ($232.30) each, had been paid by the Drug Company up to that time. This would amount to Six hundred ninety-six dollars and ninety cents ($696.90). Smith desired to hold the policy until "after the payments for all of" Rumsey's stock had been made. There was a long discussion by correspondence, Rumsey being in the States, and Smith in Honolulu, as to whether Rumsey should pay the *full* amount of the premiums, or whether *fairness and equity* required that the Drug Company should stand a part of the premiums, on the theory that it had had some benefit from the insurance while it was beneficiary. Smith, exercising the dominance which, the record shows, he observed toward Rumsey throughout the period covered by the facts stipulated, settled this difference on his own original terms and the matter stood thus when the Drug Company failed to complete the purchase of Rumsey's stock. Smith completed the purchase of one-half of the stock of Rumsey, for the Drug Company, but failed to carry out the agreement to purchase the remainder and disagreements and disputes arose between Smith and Rumsey.

When Rumsey finally demanded that the insurance policy be turned over to him on payment of the premiums, Smith, for the Drug Company, refused to comply.

On the 10th of July, 1907, Mr. Rumsey changed the beneficiary, on a form furnished for that purpose by the Company, and named his wife as beneficiary, and sent the change to the Home Office of the Company in New York. In this connection, the Insurance Com-

pany was notified of all the facts, as hereinbefore and hereinafter stated, with reference to the circumstances under which the policy was applied for, the change in the situation of the parties, and was further notified that Mr. Rumsey would pay all future premiums on the policy, as they became due. The Insurance Company placed the change of beneficiary on file, but notified Mr. Rumsey that the Insurance Company considered that the change would not take effect until the policy was returned to the Home Office for endorsement of the change thereon. Mr. Rumsey notified the Insurance Company that he was endeavoring to get the policy from the Drug Company, that the same was held by the Drug Company against his right, that he would produce the policy for endorsement if he could, and persisted in an effort to induce the Drug Company to surrender the policy for endorsement, offering, as before, to reimburse the Drug Company for the premiums, which it had paid and interest thereon.

On June 11, 1910, the Insurance Company accepted the annual premium due that day, from the appellant. This premium was retained by the Insurance Company until after proofs of death had been furnished, and a suit brought on the policy by the appellant in a court of general jurisdiction, at Denver, Colorado.

After the death of the insured, his widow, the appellant, obtained blanks from the Company for proof of death, had proofs made in accordance with the formula of the Company, and the same were delivered to the Insurance Company in August, 1910.

The Insurance Company declined to pay, on the

ground that the Drug Company had the policy, and claimed the proceeds. The appellant thereupon instituted suit in a court of original, general and unlimited jurisdiction in Colorado. The Insurance Company set up, as a defense, the claim of the Drug Company to the proceeds of the policy, and that the Drug Company had the physical possession of the policy and that the endorsement of the change of beneficiary had never been made thereon. The trial court sustained the position of the Insurance Company that the plaintiff could not recover without the presence of the Drug Company. This decision was affirmed by the Supreme Court of Colorado, which held

> "that the presence of Benson, Smith & Co. is essential to the protection of the Insurance Company".

The Insurance Company urged the Drug Company to come into the Colorado Court, and become a party to the action there, but the Drug Company declined to do this. Immediately following the decision of the Colorado Supreme Court, the appellant instituted the present action. It then developed that in August, 1912, the Drug Company had instituted a suit against the Insurance Company in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on the insurance policy, taking and claiming the benefit of the proofs of death furnished by the appellant; that the Insurance Company, while it filed an answer, made no defense to the action; and that judgment was entered in favor of the Drug Company, which was satisfied on the 28th of

February, 1913. The appellant was never notified of this suit, nor of the judgment, and knew nothing about either until after her present action was commenced. The trial judge found that the suit was collusive.

Article XIX of the Stipulation of Facts provides:

XIX.

> "That upon the trial * * * each of the said parties shall have the right to object to any portion of the foregoing stipulation of facts upon the ground of immateriality or irrelevancy and to introduce evidence contradictory thereto or explanatory thereof, and that the Court in deciding said cause may consider this stipulation, and all other testimony, depositions or documents offered by either party in said cause and received in evidence by the Court, and that in the event of any conflict between any statement contained in the foregoing stipulation and any deposition, document or evidence in said stipulation or between any such statement and any other deposition, document or evidence offered by either party upon the trial of said cause and received in evidence by the Court, the Court may, if it sees fit, disregard any such statement and consider in lieu thereof such other deposition, document or evidence, reserving to the said parties and each of them all rights of objection and exception" (Tr. 403).

## Questions Involved.

*The appellant contends:*

I.

That the change of beneficiary clause of the insurance policy, reserved to the insured, absolutely, the right to substitute his wife, as beneficiary, instead of the Drug Company, on such terms, with respect to reimbursement of the Drug Company for premiums advanced, as might be equitable and just, and this right was never waived, disposed of or otherwise lost.

II.

That the direct evidence, contained in the Stipulation of Facts, and the surrounding circumstances disclosed thereby, show conclusively that it was intended, at the time the insurance was applied for and written, that the right to change the beneficiary, under such circumstances as existed when the insured undertook to exercise the right of change, should be reserved by the insured and that subsequent acts of the parties show such understanding.

III.

That the insured having done all he could to exercise the right reserved to him, to change the beneficiary, and his failure to present the policy at the Home Office of the Insurance Company, for endorsement of the change, having been caused by the wrongful act of the Drug Company, the latter Company can have no advantage from its own wrong and equity will disregard this requirement, if necessary, in order to do equity.

IV.

That the condition, with respect to endorsement of the change of beneficiary on the policy, was reserved for the benefit of the Insurance Company; it was in its nature a condition subsequent; it might be waived by the Insurance Company, and it was waived by the acceptance of the premium, paid by the appellant and her husband, June 11th, 1910.

V.

That the policy in question was procured by the Drug Company as part of a scheme, effort and plan to insure the lives of divers stockholders of the Drug Company for the benefit of the Corporation; that this was an illegal transaction, and that the Drug Company cannot take the funds arising from such a transaction as against the appellant, who is morally, equitably and legally entitled to these proceeds.

That the Stipulation of Facts shows the taking out of this policy, by the Drug Company, on the life of the insured, to have been part of a gambling transaction, by the Drug Company, on the lives of its stockholders.

VI.

That even if the holding of the nominal office of Treasurer of the corporation by the insured, at the time the policy was applied for and written, created such a relation between the Drug Company and the insured, as authorized the Drug Company to insure the life of deceased for its benefit or to "require" that

insured should take out a policy on his life for the benefit of, and at the expense of, the corporation, nevertheless, such relationship having terminated, long before the change of beneficiary was made by the insured, the supposed insurable interest had terminated, and although the reservation in the policy, by the insured, of the right to change the beneficiary might have been *suspended* during the time the insurable interest of the Drug Company existed, the reservation came into effect, *ex proprio vigore,* immediately upon the cessation of the relation which created the insurable interest.

### Brief and Argument.

We do not, by the order in which we have stated the appellant's contentions, intend to indicate that we regard any one of them as more persuasive, important or conclusive than the other.

We do insist, however, that the record demonstrates so conclusively the right of the insured to change the beneficiary, at the time he made the change and registered it with the Insurance Company, that when the Court has examined this phase of the case, it will find it unnecessary to go into the questions of insurable interest, gambling in life insurance policies, and the like, and the Court can save itself much labor by taking up the questions involved substantially in the order in which we have presented them above and determining only so many of them as may be necessary to a determination of the rights of the appellant.

## I-II.

We will discuss propositions I and II together.

### I.

Assuming, for the purposes of argument, the transaction, of which the taking out of the insurance policy was a part, to have been perfectly legal in all respects, and assuming that Mr. Rumsey acted as a *free agent* in becoming a party to the transaction and "doing his bit", which was to sign the application and, supposedly, submit to a physical examination—assuming this although the facts set out in the Stipulation make it plain that the "retirement" of Mr. Rumsey, from the service of the Drug Company, would have been the penalty for refusing to comply with what was "required", then the contract under which the policy was applied for and issued, was a tripartite contract between the Drug Company, Rumsey and the Insurance Company; and the terms of the policy are a part of that contract; hence the *reservation,* by the insured, *of the right to change the beneficiary* was a part of the contract, and *constituted a vested right in the policy.* The condition to the taking effect of that right when exercised, that the change must be endorsed on the policy, at the Home Office, before becoming effective, taken in connection with the physical possession of the policy by the Drug Company, must be construed as having been intended for the protection of such rights as the Drug Company might have in the policy at the time the transfer, or the change of beneficiary was attempted.

*Following the well-known rule of construction, that effect must be given to all parts of the contract, this is the only interpretation possible.* The construction put upon the contract by the Drug Company, *destroys the reservation* of the right to change the beneficiary; whereas, this construction harmonizes the contract and gives effect to both provisions. The reasons for this interpretation are supported by the fact that the policy itself provides for the designation of an *"Absolute Beneficiary"*, and that it must be presumed, under all rules of construction, that the Drug Company would have been made the Absolute Beneficiary, had such been the intention of the parties.

**Rumsey had a right by contract with the Drug Company to change the beneficiary.**

The opinion of the Territorial Supreme Court speaks of the "result contemplated by the parties".

Waiving, for the purpose of the argument of this proposition, all question as to insurable interest and the like, let us look at the transaction as of the date of the policy.

Assuming the Drug Company's view, that it had a right to require Rumsey to allow it to insure his life for the benefit of the corporation, and that the agreement between the corporation and Rumsey, that the corporation would insure Rumsey's life for the benefit of the corporation, was perfectly legal, the contract—the actual contract—the whole contract—is not arrived at by finding out what Smith, the mouthpiece of the corporation, said to Rumsey and what Rumsey said to Smith, or by adding thereto *the mere fact* that the

policy was issued. *The policy itself is a part of the contract between the Drug Company and Rumsey,* as well as between Rumsey, the Drug Company and the Insurance Company.

The Drug Company's contention *eliminates Rumsey altogether as a party to the transaction,* for if Rumsey had no rights under that clause of the policy which relates to change of beneficiary, he was not a party to the contract at all: *instead of being a live man, he had just as well been the colored glass in the window of the Drug Company's drug-store,* the time-immemorial sign of the apothecary shop.

If Rumsey had no rights under the change of beneficiary clause, *without obtaining the possession of the policy, then he had no right at all,* because he had no power to obtain the possession of the policy. He could not get possession unless by the grace of the Drug Company, and the clause was ineffective and ineffectual if he had to depend on the grace of the Drug Company to enable him to present the policy "At the Home Office". He would have had just as much right in, and control of, the insurance had there been no change of beneficiary clause in the policy, for the Drug Company could at its pleasure, have made him a gift of the policy, or could have sold the policy to him and registered and evidenced the transaction by an assignment of the policy. The position of the Drug Company is based on the theory that some act by the Drug Company was necessary to create in or confer on the insured *any right whatsoever,* and this is exactly what would have been the case had there been no such clause in the policy.

The parties did not so act; they did not leave matters in this way. On the contrary, the policy in its very beginning, promises to pay

> "to the firm of Benson, Smith & Co., Ltd., or its legal representatives, OR TO SUCH BENEFICIARY AS MAY HAVE BEEN DULY DESIGNATED AT THE HOME OFFICE OF THE COMPANY".

And then follows the significant clause

> "Change of Beneficiary", etc.

If this stood alone, it should be sufficient, but the language which follows dissipates any doubt that might otherwise possibly exist.

> "The insured may at any time by written notice to the Company, at the Home Office, declare any beneficiary then named to be an *absolute beneficiary* under this policy".

We, therefore, have the policy written with these two provisions:

(*a*) That the insured may CHANGE the beneficiary.

(*b*) That the insured may DECLARE the beneficiary named to be an ABSOLUTE BENEFICIARY. *The Drug Company now claims that it was at all times an absolute beneficiary,* and that for that reason, the insured never had any right, to change the beneficiary.

If this were the intention of the parties, if this was the contract, why was it not so expressed? Why was plain language used which cannot by any construction of which it is capable, be harmonized with such an intent?

The result contemplated by the parties is made the basis of the decision of *Olmstead* vs. *Keyes,* 85 N. Y. 593, cited by the Territorial Supreme Court and the Territorial Supreme Court verbally accepts this supremely fair basis.

Evidently the parties to the transaction at bar contemplated:

(1) That Rumsey might want to change the beneficiary;

(2) That the Drug Company might have claims against the policy;

(3) That the Drug Company would act honestly and fairly in the matter and would surrender the policy, just as Smith at first proposed to surrender it, when the rights of the Drug Company were satisfied.

**The parties acted subsequently on the theory that Rumsey had the right of change reserved to him in the policy**

and

**The Drug Company for a valuable consideration agreed that Rumsey might change the beneficiary on repayment of the premiums advanced by the Drug Company.**

Immediately after Mr. Rumsey married appellant, the matter of changing the beneficiary came up.

It is admitted in the answer of the Drug Company that Rumsey

> "made a purported demand upon this respondent for the surrender of said policy in the year 1905, asserting that the said Samuel L. Rumsey intended to change the beneficiary under the terms of the said policy of life insurance" (Tr. 105).

Under date of January 22, 1907, Smith in a letter to Rumsey, wrote:

> "In this connection I would mention the insurance policy on your life in the New York Life Insurance Company, in favor of the firm for the sum of $5,000. The annual premium on this is $232.30. There have been three premiums paid thereon, and the next one is due in June, 1907. This policy could be assigned to you by the firm after the payments of all of your stock had been made, and on the re-payment to the firm of the amounts expended for annual premiums. That is, if you should so desire it. The policy could then be placed for the benefit of your wife" (Tr. 141).

Mr. Rumsey, replying under date of March 29, 1907, criticised the decision of Smith to charge him the full amount of the premiums paid on the policy, but acceded to the proposal by concluding his letter in these words:

> "In taking over the policy, I should prefer to do so at the June payment" (Tr. 143).

The term "June payment" referred to the payment of an instalment which became due the following June under the option the Drug Company then held to purchase Rumsey's stock.

In reply to the latter letter, Smith, under date of April 11, 1907, said that

> "the business would prefer to carry the policy as *an investment*".

He then took up the suggestion made by Rumsey that the latter should not in equity be charged the full amount of the premiums paid, and said:

> "The question of equity is one that would work both ways, and carefully figured out would amount to the payments that have been made on the policy. *We will, therefore, consider this matter closed.*" (Italics ours.)

At the time this correspondence occurred, Smith had obtained for the corporation, an option on Rumsey's stock in the corporation. Such option was exercised to the extent of purchasing $5,000 of the stock at par. The panic of 1907 interfered with the consummation of the purchase by the corporation, leaving in the hands of Rumsey, or possibly the petitioner, who had then become Rumsey's wife, and to whom Rumsey transferred his stock, $5,000 par value of the stock, which had been included in the option. The intimately friendly tone of the correspondence up to that time changes into formal letters and Smith, who had expressed in the letter first quoted from, a desire merely to retain the insurance policy until the purchase of the stock was completed, now declined to turn over the policy. Rumsey's health had grown gradually worse, as is shown by the correspondence, and Smith's determination to hang onto the policy evidently increased as the health of the insured failed, but there was not as yet, nor until Rumsey's comparatively early death became inevitable, any denial of Mr. Rumsey's rights under the policy. Under date of September 25, 1907,

Smith again wrote Rumsey concerning the insurance, undertaking in his letter

> "to review the subject from the beginning in order to revive in your memory the conditions under which insurance became a feature of the business".

He adds:

> "When in 1903 (the date is erroneous, should be 1904) I took out life insurance on my life in favor of Benson, Smith & Co., Ltd., for the sum of Five Thousand Dollars * * * I required that all the stockholders in *active service* with me should take out policies of like amount each, viz: Five thousand dollars, in favor of the corporation of Benson, Smith & Co. *This was a requirement of mine, and refusal to do so on the part of anyone would have justified me in asking for the retirement of the party refusing.* (Tr. 159.) (Italics ours.)
>
> * * * *
>
> "You state that the Corporation has no right to hold a policy on your life. In this you are mistaken. *The Corporation has a right to hold a policy on your life, on the life of the President of the United States, and the Emperor of Germany, or any other person on whom the Life Insurance Company will take a risk* * * * *This is a fact that is often made use of by speculators.* You state that you had intended taking up this matter up but I had anticipated you.
>
> "Reference to my letter of the 22d of January, '07, will show you that I suggested that you take over the policy AFTER all of your stock had

> been retired, and on the re-payment to the Corporation of the amounts expended for premiums. *This suggestion remains in force*" (Tr. 161). (Italics ours.)

Under date of May 16, 1908, referring to the question whether Rumsey should pay the whole amount of the premiums or some proportion less than the whole, Smith wrote:

> "I would render myself liable to indictment were I to turn over to you an asset of this nature *without receiving the compensation asked for in my advices on the subject*".

The relations between Smith and Rumsey grew more strained and under date of May 16, 1908, Smith, in a letter, denounced something which Rumsey had written in a previous letter, as

> "a malicious misstatement".

Considering the close relation, which Smith contended should be maintained between the stock held by Rumsey and the insurance policy, it is quite clear that Smith's statement "we will therefore consider this matter as closed" in his letter of January 22, 1907, and his statement "this suggestion remains in force" in his letter of September 25, 1907, taken in connection with his statement in those letters that the change in the policy was to be made AFTER Mr. Rumsey's "stock" had been retired and on the repayment to the corporation of the amounts expended for premiums, that such a disposition of the insurance was then considered by Smith as a concluded matter.

What Rumsey said with reference to Smith's proposition that he should reimburse the Drug Company for the *entire* amount of the premiums paid is a *criticism rather than a dissent.* The correspondence shows that it was so regarded by Smith. This is not like one of those cases where the minds of parties, attempting to make a contract by correspondence, has to meet on every identical item in order that a contract may result. The right of Rumsey to change the beneficiary of the policy was asserted, and it was considered and acknowledged and this occurred in connection with the option of the Drug Company to purchase the stock. It was not as if Rumsey had not, or did not, assert any right in the policy. If it were an original proposition for the barter and sale of an article it would be necessary, in order to make a concluded contract, that the parties should agree upon a price. Here was property which Rumsey claimed and the only question was how much he *owed* on the property, *not to purchase it, but to redeem it,* as it were.

The correspondence amounts to an agreement:

1st: That he had the right to redeem on the payment of what is equitably due; and

2nd: That the amount equitably due was the amount which the Company had paid for premiums.

The fact that the Drug Company fell down on its undertaking to purchase all the stock or failed to purchase all of it, at that time, cannot affect the rights in the insurance policy which were then conceded in connection with the right which the Drug Company

obtained to purchase the stock. *The Drug Company did purchase all the stock before it realized upon the insurance policy.*

One of the purposes variously claimed by Smith to be the purpose for which the insurance was taken, had thus been accomplished.

That Smith anticipated that the marriage of Rumsey would probably be followed by a change of the beneficiary in the insurance policy from the Drug Company to the wife is clearly shown by a letter written by Smith dated Honolulu, October 6th, 1905. The salutation is: "Dear Rumsey". A letter from Rumsey on the 19th of September is acknowledged. "The first "subject is your marriage, of which I am now first "regularly advised." Then follows in considerable space complaint that he, Smith, had not been sooner and more formally advised of Rumsey's intentions, and then the following paragraphs which can relate to nothing except the insurance policy:

> "In a matter of this kind an outsider has no right to interfere, it is each man's own privilege and his own right to judge for himself.
>
> In his relations, however, to his business associates it is customary and expected that he will give definite information. I was so advised in regard to Gignoux and would so expect to be advised by any other that I should select to be associated with me in business. When I admitted you into this business no such occurrence had arisen. In the present instance, however, I should have been fully advised. The acts injects a contingency into the business that, in view of the condition of your health and the

possibility of your inability for business or death, that will complicate matters, and I was entitled to a consultation in the matter and a statement of the anticipated time and whatever arrangements might be proposed for your estate.

*Your failure to advise me has, in my opinion, been a dereliction of duty toward me.*

I am now entitled to know what change, if any, you may make in the disposition of your property that is directly connected with this business."

*Marriage* of one of the stockholders of the Company does not ordinarily inject "a contingency into the business * * * that will complicate matters".

Even a stockholder in a corporation, as close as Smith proclaims the Drug Company to have been, has a right to enter into that still closer corporation known as wedlock. *Rumsey married,* might have performed, toward the Corporation, any duty which *Rumsey single* might have performed. At least the law, in the absence of evidence, will so presume.

Reference is made, in the portion of the letter quoted, to the condition of Mr. Rumsey's health—the insurance policy was undoubtedly in view. It must be because of the insurance policy that Smith wrote Rumsey "your failure to advise me has, in my opinion, been a dereliction of duty toward me".

*"The disposition of your property that is directly connected with this business"* must have included the insurance policy. If the stock which Rumsey held in the Corporation had alone been referred to, this cir-

cumlocutive phraseology used would not have been adopted. Rumsey had only *two kinds* of "property that is directly connected with this business"—

(1) *The insurance policy.*

(2) The shares of stock.

All these things show that neither Smith nor Rumsey nor the Insurance Company supposed that the rights of the parties were as they now stand adjudged by the decision of the Territorial Supreme Court.

### Opinion of the Territorial Supreme Court.

With the greatest deference we submit that a consideration of this opinion discloses a very limited and narrow view of this controversy, a misunderstanding of many of the salient facts and an utter failure to consider many others. The decision is rested solely upon the question of insurable interest, although, as we have shown, it is not necessary to decide that question at all.

*There is no consideration of the equities of the case in the opinion.*

There is no consideration of the contract.

In the attempt, made by the Court, to state the facts in the case, coming to what occurred between Rumsey and the Drug Company, with reference to the ownership of the policy, after Rumsey had severed his connection with the Drug Company and married the appellant, this statement is made:

> "A long correspondence occurred between Rumsey and his wife and Benson, Smith &

> Company, Limited, which manifests a difference of opinion between them as to their respective rights under the policy, Benson, Smith & Company insisting upon the right to be considered the sole owner of all beneficial interest therein and the Rumseys insisting that even though such beneficial interest had formerly existed in Benson, Smith & Company, Limited, it had ceased upon the cessation of the relationship between Rumsey & Benson, Smith & Company, Limited" (Tr. 447).

The excerpt quoted is not a correct statement of the facts. It ignores the fact that Smith at first *conceded* Rumsey's right to change the beneficiary.

The only difference between Smith and Rumsey was whether Rumsey should reimburse the Drug Company for all the premiums that had been paid, or only for a portion or proportion based upon some equitable consideration with respect to the stock holdings of the different parties, and that Smith, in pursuance of the dominance which the correspondence clearly discloses he held over Rumsey, settled the matter as follows:

> "The question of the equity is one that would work (would) both ways (123) and, carefully figured out, would amount to the payments that have been made on the policy. *We will, therefore, consider this matter as closed"* (Tr. 146).

The opinion ignores the fact that in his letter of September 25th, 1907, Smith reiterated the statement contained in his letter of January 22nd, 1907, *that after Rumsey's stock had been retired, and on the repayment to the corporation of the amounts expended for*

*premiums,* the possession of the policy could be had by Rumsey, and added, "This suggestion remains in force".

That "suggestion" was never withdrawn. It remained in force. At the time the "suggestion" was made, Smith held an option on all Rumsey's stock and was engaged in taking it over or "retiring" it, as Smith calls it. The acknowledgment by Smith, on behalf of the Drug Company, of Rumsey's right to the policy, that is, to change the beneficiary in the policy, was a part of the contract under which Smith obtained the option to take over Rumsey's stock, and if Rumsey did not have the right to change the beneficiary by the original contract he obtained that right by this latter contract. Under the latter contract he gave a valuable consideration for that right. That consideration did not fall by reason of the fact that Smith delayed taking over a part of the stock until after Rumsey's death. All questions of this kind are ignored in the opinion of the Territorial Court, yet these are things which raise equities in favor of appellant which should appeal to the conscience of any Chancellor.

The whole opinion discloses that the Territorial Supreme Court was diverted from a consideration of the merits of the case and determined adversely to appellant because it disagreed with the Trial Judge, on what may well be considered merely an abstract question of law, unnecessary to be determined in order to arrive at a determination of this controversy consistent with the high principles of equity and supported by every moral consideration.

## III-IV.

We shall discuss the propositions III and IV together:

**Mr. Rumsey takes up change of beneficiary with the Insurance Company.**

June 8, 1907, the attorneys for Mr. Rumsey wrote the Insurance Company, calling attention to this policy and the circumstances under which it was taken out, and notifying the Company that Mr. Rumsey had severed his connection with the Corporation, Benson, Smith & Company, sold his interest therein, and removed to Colorado, and asked for a copy of the policy. After considerable correspondence between the Company and Mr. Rumsey's attorneys, the Company forwarded a copy of the provision of the policy with relation to change of beneficiary, and thereupon Mr. Rumsey signed the change on the form furnished by the Company as follows (Tr. 257-263).

> "The beneficiary under Policy No. 3442989, in accordance with the change of beneficiary clause thereof, is hereby changed from Benson, Smith & Co., Ltd. to Emma Forsyth Rumsey. The policy is not now assigned."

This change of beneficiary was forwarded to the Insurance Company about July 10, 1907, with notification to the Insurance Company that Mr. Rumsey was able, ready and willing to pay any and all premiums due under the policy, and a request that the Insurance Company notify Mr. Rumsey's attorneys when the premiums were coming due.

Correspondence ensued between Mr. Rumsey's attorneys and the Insurance Company, and between his attorneys and the Drug Company, the effort being to induce the Drug Company to forward the policy so that the Insurance Company might endorse the change of beneficiary thereon, and to show the Insurance Company that inasmuch as the policy was detained against Mr. Rumsey's right, the change of beneficiary which had been signed by Mr. Rumsey and forwarded to and was held by the Insurance Company, had effectuated the change. The Insurance Company, under date of "October 5, 1907", asked Mr. Rumsey's attorneys to

> "inform the insured that unless we hear from him within a reasonable length of time, we will return the request for change of beneficiary, with our records unchanged,"

to which the attorneys wrote, referring to their efforts to obtain the policy from Honolulu, stating:

> "We do not see why we should return the request for a change of beneficiary, nor do we see that the return of the same can change the legal rights of any of the parties; no more can the retention of the same by you."

Thus matters stood on May 6, 1910, when the attorneys for Mr. and Mrs. Rumsey wrote the Insurance Company, referring to the previous correspondence, stating:

> "The position of our clients * * * is that * * * under the circumstances of this case you are (not) permitted to deal with this policy, either by way of surrender * * * or otherwise, except at your own risk, without the consent of Emma Forsyth Rumsey."

The cessation of Mr. Rumsey's connection with the Company, the fact that he had parted with his stock therein is recited, and the Company is then notified:

> "We desire to make tender of the annual premium which * * * will become due June 11, 1910, and we will have such tender made at your office in New York, unless you feel that you can advise us that it may be made at the office of your Company in Denver, a procedure which would save us some trouble; *or advise us that in any event you will not receive or accept our tender, which, of course, will do away with the necessity of a tender.*"

Under date of May 13th, the Insurance Company replied to the last mentioned letter, acknowledging the receipt of the same, and stating that it had been placed on file and duly noted in the records of the Company, and saying:

> "You can make tender of the premiums due at our office in Denver, if you so desire."

The attorneys replied to this letter under date of May 16th, acknowledging the same, and saying:

> "In pursuance therewith, we shall make tender of the premium mentioned, at your office in Denver, Colorado."

On June 10th, the premium was paid into the branch office of the Insurance Company, at Denver, Colorado, and a receipt given by the branch office, reciting in effect that the branch office knew nothing about the matter and received the amount

> "only for transmission to the Home Office in New York."

On June 9th, Mr. Rumsey's attorneys in Denver wrote:

> "In pursuance of our recent correspondence, and permission to that effect contained in yours of the 13th ult., we on yesterday paid your office in Denver, $232.30, annual premium on this policy due today. Your Denver Office, having no advices on the subject, has accepted the money for forwarding only, and given receipt accordingly. We shall be pleased to have your early advices as to whether this payment is accepted."

Under date of June 17th, the Insurance Company acknowledged the last mentioned letter and added:

> "We have to inform you that we are now in receipt of advice from our Colorado branch, located at Jacobson Building, Denver, Colorado, that they received from you $232.30, on account of the premium due June 11, 1910, which amount will carry the policy up to June 11, 1911. We have this day written to our Honolulu branch, which office is in charge of the collection of premiums, directing them to countersign renewal receipt and forward same to you."

In the opinion of the Territorial Supreme Court these facts are erroneously stated and misinterpreted in the following language:

> "The payment was made to the agent of the Insurance Company at Denver, Colorado, by the attorney of the Rumseys. The receipt for the money given by the agent recites that the payment was received from the attorney 'for his accommodation and at his request' and that

> 'neither I nor the office of said company with which I am connected have any record or knowledge of said policy, or authority to collect a premium upon it" (Tr. 445).

The opinion wholly overlooks this correspondence which clearly shows that the money was not "paid", so to speak, to the agent in Denver at all. The Denver office was used as a mere means of transmitting the money to the Home Office, just as the Post Office or an express company or a bank might have been used—the Branch Office was so used with the consent of the Insurance Company.

The Insurance Company through the Home Office acknowledged receipt of this premium unconditionally.

The Territorial Supreme Court did not, apparently, apprehend the facts with respect to this.

This premium was retained by the Insurance Company until after the commencement of the suit in Colorado already alluded to.

The Insurance Company did not offer to pay the money back when it was notified by Mrs. Rumsey of the death of Mr. Rumsey, and asked to furnish her blank forms for proofs of his death.

The Insurance Company did not tender this money back when the proofs of Mr. Rumsey's death were furnished to it by Mrs. Rumsey.

The Insurance Company did not even tender the money back promptly after being sued. The suit was commenced August 15, 1910. Tender was made August 29, 1910.

We confidently submit that the rights which accrued

by reason of the acceptance of the premium by the Insurance Company, were not lost by the fact that the Company tendered repayment of the money nearly three months afterwards.

Running parallel with the correspondence with the Insurance Company, there was correspondence with the Drug Company. In May, 1910, the appellant, through her attorneys, notified the Drug Company not to pay any further premiums on the policy and referred to the fact that a notice, that the beneficiary had been changed, had been given to the Drug Company about the time the change was made. The letter stated the position of the insured and appellant to be, that if the Drug Company had ever had any right, as beneficiary, the right ceased when Mr. Rumsey's connection with the Company ceased, and stated that tender to the Insurance Company, of the amount of the annual premium to become due June 11, 1910, would be made by the Rumseys. Smith answered this letter, stating that the Drug Company was advised by counsel that its interest in the policy was unaffected by the attempt of Mr. Rumsey to change the beneficiary and making an offer to assign the policy and pay $1,000 for the remaining 50 shares of stock held by Mrs. Rumsey in the Company. There can be no dispute, therefore, but that Mr. Rumsey and the appellant did everything that could be done by them to obtain possession of the policy so that the change of beneficiary might be endorsed thereon "at the Home Office", and that it was because of the refusal of the Drug Company to comply with their demands that the endorsement was not made.

As was so well said by the learned trial Judge:

> "The maxim that equity regards as done that which should have been done, makes the refusal of the Drug Company to surrender the policy for endorsement ineffectual to accomplish the purpose of defrauding the widow of the insurance money".

It would seem clear that the physical possession of the policy, its retention by the Drug Company, can cut no figure in this case.

Suppose Rumsey had obtained physical possession and had had the endorsement made, would that have given the appellant any right, if she does not have that right now?

Suppose Smith had, like Rumsey, married and changed the beneficiary in his policy and had sent his policy to the home office and had the change endorsed. Would that have given any greater right to Smith's widow than the widow of Rumsey has?

The Drug Company is endeavoring to take advantage of its own fraud in insisting upon its refusal to deliver up the policy and the consequent failure to have the change of beneficiary made by the insured endorsed on the policy, in accordance with the condition subsequent printed in the policy.

We do not believe that this Court will tolerate such conduct. To do so would be to violate every rule of equity, justice and good conscience laid down by the great chancellors who have made equity jurisprudence the pride of the legal profession and the bulwark against injustice and fraud.

Courts of equity sit for the purpose of granting relief against fraud, not for the purpose of helping to perpetuate it.

The provision that Rumsey had a right to change the beneficiary was in the policy when it was issued. It always remained in the policy. When Rumsey undertook to change the beneficiary he undertook to exercise a right which the Drug Company had contracted with him and had contracted with the Insurance Company that Rumsey might exercise. It held the policy subject to this right and had no more authority to confiscate this right and appropriate it to its own use than it would have had to appropriate the property which the correspondence discloses Rumsey left in the Islands when the dreaded white plague drove him to the mainland.

The Drug Company seems to have a very distorted idea of what constitutes clean hands, equity, justice and good conscience. The learned judge of the trial court found that the refusal of the Drug Company to permit the change of beneficiary to be endorsed upon the policy was wrongful and that the wrongdoer cannot take advantage of its wrong. As this question was thoroughly and ably discussed by Judge Ashford in his opinion, we quote the following:

> "The physical possession of the policy in question was held, from first to last, by the Drug Company, whereby it became and continued impossible for the Rumseys to make literal and technical compliance with the provision of the policy regarding a change of beneficiary, to wit, that the policy should be forwarded to

the home office in New York, and there have the change endorsed upon it. The failure to secure such formal and technical change of beneficiary, and the endorsement thereof on the policy, (a change frequently requested by the Rumseys, who were balked in their efforts by the refusal of the Drug Company to deliver the policy for that purpose), has been and is urged as a defense herein by each of the defendants. But this is a Court of Equity, and it is one of the maxims of this branch of jurisprudence that 'equity regards that as having been done which should have been done'. I therefore regard this point of the defense as being not only highly technical, but utterly unmeritorious, and will consider and decide the case in all respects as though the change of beneficiary had in fact been made in accordance with the express terms of the policy itself. It would be not only inequitable, but intolerable to hold that the Drug Company could, by the mere fact of securing the physical possession of that piece of paper, and withholding it beyond the reach of the Rumseys, defeat the rights of the latter, (if any), to effect a change of beneficiary. Such a course of conduct should certainly not be approved by a court of conscience.

"In addition to consistent and repeated efforts of the Rumseys to secure such technical compliance as above, with the terms of the policy, respecting the endorsement thereon of a change of beneficiary, they formally and sufficiently notified the Insurance Company, long before the death of the insured, that he had changed the beneficiary in and under the policy, by substituting his wife, the present plaintiff, for the Drug Company. It is true that the

Insurance Company replied to this notice, or these notices, to the effect that the change could not be adequately effected except by the manual and physical delivery of the document itself at its home office, for the purpose of having such endorsement made,—but this plea was met by full explanation to the Insurance Company of the situation as it existed, and as above described. It is sufficiently obvious that no rights of the Insurance Company, or of any third party, suffered in the slightest degree through the failure, because of their inability as above described, of the Rumseys, to make manual and physical delivery of the policy at the home office of the Insurance Company for said purpose. Therefore, it would be grotesque, in the extreme, to hold that the Insurance Company could avoid or evade any equitable obligation to the plaintiff by virtue of such failure to obtain such endorsement. And it would be equally intolerable, and for the same reason, to hold that the Drug Company could obtain any right as against plaintiff, through the exercise or practice of the wrongful act, (if it was wrongful), involved in the withholding from the insured the physical possession of the policy in question, and thereby preventing the consummation of the physical act of the endorsement thereon of a substitution of beneficiary.

"There is no lack of authority for this proposition. An excellent discussion of this principle occurs in *Jory* v. *Supreme Council, etc.,* 105 Cal. 20, 26, 27. In that case, the beneficiary certificate taken out by a member of a fraternal order had been made payable to her daughter, and delivered into the custody of the latter. The mother later desired (in accordance with

the laws of the Order), to substitute her son as beneficiary, in place of the daughter. The daughter refused to deliver the certificate for the purpose of having the transfer made, at the head office of the fraternal Order. The mother fully informed the appropriate officials of the Order of her desire to substitute her son, and of the reasons of her inability to produce the document, as above, but, as in the case at bar, those officials refused to recognize such attempt at substitution, as a real substitution, or to issue a new certificate. The mother died, and the son brought suit to recover the death benefit. The Supreme Court of California, in deciding the case, used the following language, *inter alia*:

> "'As between them' (the son and the daughter), 'there was a substitution of beneficiaries in the eyes of a court of Equity. * * * As between these parties litigant, the court will administer justice from the standpoint of equity, and bring to the solution of this question, those broad principles upon the basis of which equity always deals. The general rule unquestionably is that a change of beneficiary cannot be made by the insured unless a substantial compliance with the laws and regulations of the society is had; yet courts of equity have recognized various exceptions to this general principle, and the facts of this case bring it squarely within one of the well-recognized exceptions. This exception is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that when the insured complies with all the requirements of the rules for the purpose

of making the substitution of beneficiaries, with which he has the power to comply, he has done all that a court of equity demands. * * * Impossibilities are not required, and if the certificate had been lost or destroyed, and thus the surrender made impossible, equity would have treated the surrender as duly made; and in legal effect the certificate was lost in this case. But there is another well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrongs. No man is allowed to come into a court of equity, and reap beneficial results from his own iniquity. If Mrs. Jory had the right to make the change of beneficiaries, and did all that it was possible for her to do toward making such change, but was prevented by the acts of appellant from a consummation of her intentions, then appellant will not be allowed to derive any benefit from her fraudulent conduct. If a fraud of her own practicing prevented a legal substitution of beneficiaries, then as against her an equitable substitution will be held to have taken place' " (Tr. 409-13).

## V.

### Insurable Interest—Gambling Transaction.

The legal proposition upon which the defense is based is contained in the 18th clause of the Stipulation (Tr. 385), wherein what James H. McIntosh, general counsel of the Insurance Company, would testify if called as a witness is set forth as being

"that * * * by the laws of the State of New York * * * one person may take out insur-

> ance on his own life and make the insurance payable to any person, partnership, corporation or other beneficiary whom he may name in the policy, and such beneficiary thereof need under the laws of said State of New York have no interest nor continue to have an interest in the life of the insured."

This proposition seems to have caught the ear of the Territorial Supreme Court and to have impelled a determination adverse to the appellant, although there is no fact in the case which brings the transaction involved at bar within the legal principle laid down by Mr. McIntosh.

We may concede that what Mr. McIntosh was willing to swear to is the law and yet neither respondent can have any benefit from the concession.

The proposition that one may insure his own life, for the benefit of a stranger, is not involved here.

The reverse is the case.

Can a stranger insure my life or your life for his benefit?

Smith's idea and, according to Smith, the idea upon which the Drug Company's action in taking out this insurance was based, is set forth in Smith's letter *in re* taking out insurance "on the life of the President of the United States, the Emperor of Germany or any other person" (Tr. 161) quoted *supra.*

The real question here is, *has a corporation an insurable interest in the life of a stockholder, an interest which permits the corporation to insure the life of the stockholder as a wife may insure the life of a husband?*

That *this insurance was taken out by the corpora-*

*tion,* acting through its dominating and controlling member, George W. Smith, *and was not taken out by the insured,* is so conclusively demonstrated in the agreed statement of facts that attention need only be called to these facts. Argument and construction are unnecessary.

The statement of Smith in his letter to Rumsey of September 25, 1907 (Tr. 159), "I *required* that all of the stockholders in active service with me should take out policies * * * in favor of the corporation. * * * *This was a requirement of mine and a refusal so to do on the part of any one would have justified me in asking for the retirement of the party refusing"* should do, but we beg to quote from the deposition of Purdy, the special agent of the Insurance Company, *who was paid out of the first premiums:*

In answer to interrogatory 10, Purdy, who solicited the insurance on behalf of the Insurance Company, says:

> "Applications were made for insurance upon the lives of George W. Smith, A. J. Gignoux and Samuel L. Rumsey to me as agent of the New York Life Insurance Co., at the same time on June 11, 1903" (Tr. 249).

Answer to interrogatory 11 follows:

> "There were present Messrs. Smith, Rumsey and Gignoux in the office compartment of Benson, Smith & Co., in Honolulu. *I asked Mr. Smith if he had come to a favorable decision in the matter of taking insurance on the lives of the ACTIVE MEMBERS of the CORPORATION* for the benefit of the corporation in the

> event of its loss by the death of any one of the *ACTIVE MEMBERS.* He said (191) 'Yes, go ahead $5,000 each.' I sat at his desk and completed the three applications, making Benson, Smith & Co., the beneficiary in each application. Each applicant signed his application and *I allowed Mr. Smith to pick out a physician naming over five different examiners to make the examinations,* saying if for business reasons it was any advantage to him he could have his choice of examiners" (Tr. 249). (Italics and caps. ours, Tr. 249.)

In the language of the day Mr. Purdy was "onto his job". He let Mr. Rumsey pick out his own physician to make the examination. There is nothing in the record on the subject, but the facts suggest that it is not strange that a man who developed incurable lung trouble, very shortly after the policy was issued and had to give up business on account of this trouble, and who had to leave Hawaii a few months after delivery of the policy and who was only able to survive this dread disease for a few years by seeking the benefits of the climate of Colorado and California, passed such a good physical examination that Mr. Purdy wanted to insure him some more.

In interrogatory 21 the witness Purdy was asked for conversations with Rumsey with reference to the policy (Tr. 241). His answer follows:

> "After Mr. Rumsey had been examined for the corporation insurance in favor of Benson, Smith & Co. I suggested that he had passed a good examination and had better take out a policy on his own account. He said no, that he

> was a bachelor never expected to marry and called my attention to the longevity of his family as evidenced in the medical examination and said that he did not care to do any life insurance business on his own account" (Tr. 251).

This testimony of Purdy shows that it was not Rumsey who was insuring Rumsey's life. It was Smith—*alias* the Drug Company.

The Trial Judge in discussing the real purposes of the Drug Company in taking out the policy on the life of Rumsey, said:

> "The purpose lying at the root of the action of the Drug Company in taking out this policy, as well as the taking of the policies on the lives of Messrs. Smith and Gignoux, may here be appropriately discussed. It is true that the stipulation declares such purpose to have been,—'for the purpose of protecting the interests of said Benson, Smith & Company, Limited, in the event of the death of any of the said Samuel L. Rumsey, George W. Smith, and Alexis J. Gignoux, officers, directors and stockholders as aforesaid.'
>
> "The Stipulation provides (see Tr. p. 402) that the Court may find, if the correspondence, depositions, and other contents of the Stipulation so warrant, a different state of facts from those set forth in the Stipulation itself. Availing myself of this latitude, I now inquire whether the passage in the Stipulation, last above quoted, correctly states the fact respecting the purpose of the Drug Company in taking out the several policies indicated.

"Upon the argument, counsel for the Drug Company insisted that the real, if not the sole purpose involved, was (with respect to the Rumsey policy, for example), to give the Drug Company in the event of the death of Rumsey, a 'head-start' over possible competitors for the purchase of the Rumsey stock, in the form of a fund of Five Thousand Dollars. It has been insisted throughout that the Drug Company was and is a 'close corporation', allowing no 'outsiders', nor any persons except such as should pass muster before the remaining stockholders, to acquire stock therein. Involved in this was the further purpose to prevent their stock being acquired by competitors or enemies of the concern, whereby their books might be examined, to their possible prejudice. And therefore, it was deemed desirable to provide a fund that should at least give the corporation such 'head-start', in the effort to purchase the stock of a deceased stockholder, even though such fund should not be sufficient to pay for all of it. The great inequality in the number of shares owned by the three leading stockholders respectively (Smith, 363; Rumsey, 100; Gignoux, 30), might have suggested the wisdom of graduating the amount of insurance upon each life in some proportion to the stock held by each,—instead of which course, a uniform sum of Five Thousand Dollars each was determined upon. It will thus be seen that such sum would have paid for the Gignoux stock at par, and would have left a forty per cent balance; would have paid for only one-half of the Rumsey stock, and would have paid for a comparatively trifling proportion of the Smith stock. Some materiality attaches to this phase of the

case, in support of the conclusion at which I have arrived with respect to it, namely that this entire series of transactions constituted what, in law, are known as a wagering contracts,—and that the real purpose of the corporation in taking out the insurance in question, when stripped of verbiage and euphonious diction, was merely to speculate upon the lives of the three principal stockholders in the corporation. And this I find, in contradiction of the purpose stated in the Stipulation, but within the latitude allowed to me thereby, to have been the real and ultimate purpose of the corporation in so insuring the lives of its three officers as above.

"I find support for this conclusion in the correspondence and depositions referred to. The right of the Drug Company to hold, or even to take such insurance having been questioned by Rumsey (Stip. p. 33), in the course of a letter asking for 'an equitable settlement of the insurance policy on his life', and in which he held that the corporation had then no interest in his life to sustain its course in carrying the policy—'although it might have done so while I was actually connected with the Company as an officer',—the Drug Company replied (Stip. p. 37), contending that 'the corporation has a right to hold the policy on your life, on the life of the President of the United States, the Emperor of Germany, or any other person. * * * This is a fact that is often made use of by speculators.'

"In his deposition (answer to Direct interrogatory No. 15, Stip. p. 75), Mr. Smith testifies that he desired that such policies as above should be taken out in favor of the Drug Company, 'in order that the corporation, which was

a close corporation, might be protected in the event of the death of any of its officers. * * * The purpose of such insurance was to provide the company with funds, so that, in the event of any such death, it could purchase the stock of the deceased, and thus prevent the stock going on the open market.'

"Mr. Gignoux, answering direct interrogatory 7 (Stip. p. 86), testifies that Mr. Smith (President and Manager), stated to us 'that his reason for wishing us to do so (take out policies), were in order to protect the Drug Company in case of the death of any of us, so that the firm would be in a position to purchase the stock of each of us so dying, thereby carrying out the policy of the Company to remain a close corporation, and thus preventing outsiders and competitors from becoming stockholders in the corporation.'

"The Drug Company, in a letter to the Insurance Company, Sept. 13, 1910, after the death of Rumsey, (Stip. p. 159), reasserted its claim to the beneficial interest in the policy, stating that 'the insurance was effected on account of our interest in Mr. Rumsey's life as an officer and stockholder in our Company, and also to provide means to take up his stock in case of his death.'

"As early as Jan. 22, 1907, (Stip. p. 23), the Drug Company, in writing to Mr. Rumsey, suggested that the policy in question 'could be assigned to you by the firm after the payments for all your stock have been made, and on the repayment to the firm of the amounts expended for annual premiums, that is, if you should so desire it. The policy could then be placed for

the benefit of your wife'. Mr. Rumsey replied to the above, suggesting certain concessions in regard to the amount which he should pay on account of premiums already paid by the Drug Company, and on April 11, 1907, (Stip. p. 26), the Drug Company responded to that suggestion, using the following language, *inter alia,*— 'As a matter of fact, the business would prefer to carry the policy *as an investment.*' (Italics mine.)

" 'The object of this insurance was to protect the corporation against a sudden demand for funds in the event of the death of any of the principal stockholders.' Smith to Rumsey, Sept. 25, 1907; Stip. p. 36."

"But it would serve no good purpose to quote further from the Stipulation, or the depositions or correspondence therein contained, in support of the conclusion above announced. It is manifest to my mind that *the entire transaction involved in the taking out of the three* policies referred to, *notwithstanding all attempted linguistic disguises, was nothing more or less than a series of wagering contracts* wherein and whereby the Drug Company undertook to speculate upon the lives of its three principal stockholders. No other conclusion appears possible in view of the purpose, so often and so variously repeated, that the corporation so acted in order to provide itself with a fund wherewith to pay in whole, or in part, for the stock of any of those gentlemen who should be called by death. If such a transaction does not constitute a gambling upon the lives of those insured, than I am at a loss to conceive what would constitute such a condition. It was a commercial proposition,

> pure and simple, whereby the Drug Company undertook to advance certain premiums with the prospect and expectation of reaping financial profits in the event of the death of any of its three principal stockholders whose lives were covered by said policies respectively. And such transactions are forbidden by law, as being contrary to public policy, unless there be what the law describes as 'an insurable interest', on the part of (334) the insurer in the life of the insured."

The entire opinion of the learned trial judge is found in the Transcript, pages 404 to 432. The excerpts above quoted will be found at pages 416 to 421, inclusive.

With all due respect, we beg to submit that the opinion of the trial judge discloses much more thorough investigation of the facts and the law involved, than does the opinion of the Territorial Supreme Court. The opinion of the trial judge is, indeed, so comprehensive and covers the case so completely, in all its aspects, that we ought, perhaps, to apologize for not submitting the case of appellant upon it, thus sparing the Court this more extensive discussion.

How can the Drug Company seriously insist that Smith, Gignoux and Rumsey entered into a mutual agreement to insure their lives in favor of the corporation, when the facts which we have referred to show that Smith was the only man consulted, that Smith *determined,* that Smith *required,* and that failure to comply with his *"requirement"* would have *meant dismissal* of the recalcitrant employee?

It is quite apparent, from the tone of Smith's letters to Rumsey, that Rumsey was as much dominated by Smith as if, instead of being badged as treasurer, he had been the elevator pilot in the building or the clerk at the soda water fountain. This was because the nature of Smith was naturally stronger, a fact abundantly apparent from the correspondence.

Much has been attempted to be made, in argument heretofore, of the fact that Smith, Rumsey and Gignoux all took out insurance in the same amount. *This fact instead of making in favor of the legality of the transaction, labels it as a wager on life.*

Smith had *363 shares* of stock, Rumsey *100 shares* and Gignoux *30 shares.* If there had been a mutual agreement between three free agents dealing with each other at arm's length, Smith would have taken out a policy for twelve times as much as Gignoux, as he had a little more than twelve times as much stock, and Rumsey would have taken out a policy for at least three times as much as Gignoux, as he had a little over three times as much stock as Gignoux.

The truth is that neither Rumsey nor Gignoux had any say in the matter. Smith desired the insurance to be taken out and *compelled* them to take out the same amount of insurance that he, Smith, took out, regardless of the fact that he was the principal beneficiary.

The Trial Court in support of its conclusion that there was no mutual agreement entered into by and between Smith, Rumsey and Gignoux, said, on page 10 of the decision of the Court:

> "The great inequality in the number of shares owned by the three leading stockholders

> respectively, Smith 363; Rumsey 100 shares; and Gignoux 30 shares; might have suggested the wisdom of graduating the amount of insurance upon each life in some proportion to the stock held by each, instead of which, of course, a uniform sum of $5,000 each was determined upon."

This shows that Smith was gambling on the lives of Rumsey and Gignoux.

Whether we approach the consideration of the transaction from the standpoint that Rumsey was a stockholder and that the purpose was to provide funds to buy in his stock on behalf of the corporation in the event of his death, or whether we approach it on the proposition that he was in the employ of the company, although carrying the title of an officer, a legal obstacle intervenes which prevents the realization of the *scheme which it is now said was planned by Smith at the time he compelled Rumsey to allow this policy to be issued on his life.*

The trial judge says that the seven outstanding shares of stock in the Drug Company not owned by the three men on whose lives policies were issued were "held by three or four other parties in varying amounts" (Tr. 406).

Suppose the Drug Company had taken out a policy on the life of any one or more or all of these three or four other parties. In what different stead would the transaction stand?

The whole transaction is intolerable from the standpoint of law. No court which upholds the sound public policy that prevents gambling in lives through insur-

ance policies can for a moment consider sustaining this transaction.

It would appear from the record that the Insurance Company did not know that the Drug Company was an incorporated concern, but supposed it was a copartnership (see policy, Tr. 27). See Answer, Ins. Co., Tr. 77, Paragraph III.

These allegations, taken in connection with the other admitted facts, show gambling, pure and simple.

## VI.

**If an insurable interest such as would permit the Drug Company to insure Rumsey's life for its benefit existed at the time the insurance was taken out, such interest ceased when Rumsey retired from the Company.**

Such interest did not exist at the time Rumsey changed the beneficiary and demanded the policy. What right, legal or moral, had the Drug Company to gamble on Mr. Rumsey's life and benefit by his death, when the Company had no business relations with him and was a stranger to him for years prior to and at the time of his death?

Human nature is pretty much the same the world over. The correspondence demonstrates that human nature does not change with climate. Rumsey was slipping rapidly into the grave. Realization upon the insurance policy seemed in sight. The opinion of counsel that the Drug Company could maintain the position now assumed, was obtained, and from an attitude of friendly solicitation for the welfare of the insured, the manager of the Drug Company changed his attitude to the stern and unyielding guardian of the finances of the Drug Company which he almost wholly owned.

An attempt was made in the brief in the Territorial Supreme Court to bolster up the claim of the Drug Company to the proceeds of this policy by the application of the principles on which the Virginia court rested its decision in

*Mutual Life Ins. Co.* v. *Board,* 115 Va. 836.

In that case *Board,* principal incorporator, president and general manager, *insured his life* in favor of the corporation, because it was shown that his death would result in a serious and substantial loss to the company.

The effort to find a parallel in the Virginia case is indeed far-fetched, as will be seen when we compare the attitude of Smith, head of the Drug Company, toward Rumsey's retirement from participation in the business of that Company. Under date of May 1, 1906, Rumsey wrote to Smith—"Dear George"—the pathetic letter found in Tr. 133, in which he says: "It was my hope and intention to end my days there & with the house. You have told me there is no further room".

This seems to have been written after conversations between Smith and Rumsey in Denver. On May 13th, '06, Smith wrote Rumsey from Honolulu. We quote from page 134, Tr.:

> "In all of my conversation with you in Denver I did not state to you as you have stated in your letter, I quote 'You have told me there is no further room' " (Tr. 134).

He then says that he had made a sort of examination of conscience after the interview to see whether he had said anything he would regret, or hurt Rumsey's

feelings, and justifies himself by the statement "I could not think that I had". Then follows:

> "What I endeavored to convey to you was that, while in your mind since your absence, matters had stood still and open waiting for your return, as a matter of fact things had continued to move and progress whether you or I, were present or on hand to direct. That the young men had advanced to positions of trust and knowledge of the business, that they were doing work that I had been doing, that you had done, that the position held by you was *most satisfactorily filled* by a man, who * * * was absolutely unbiased and aloof from any favoritism and free from the possibility of a charge of unfairness and that I should keep him there while I remained at the head of the business.
>
> I pointed out to you that it would be an injustice and a move that would cause loss of interest, if not withdrawal, to put either of the young men down to a lower position" (Tr. 134-135).
>
> * * * * * *
>
> I can only attribute your statement to a feeling of disappointment, one which is natural and which I, also, would feel and even now feel for *I realize that it is inevitable that, eventually, I too will have to step out to make room for the younger men that are coming forward."*

Even the pretense of the nominal relations between Rumsey and the corporation maintained by the creation of the office of Vice-President and carrying Rumsey's name in connection with the office, was not long main-

tained. Under date of December 25th, 1906, Rumsey wrote Smith:

> *"In deference to your wishes embodied in your letters & also conversation with me I tender my resignation* as Vice President & director of Benson, Smith & Co., to take effect as of 31st. This will reach you in ample time for annual meeting. I regret this necessity more than I can say or you realize. I desire you to dispose of all my stock at as early a date as possible" (Tr. 139).

In answer to this letter Smith wrote from Honolulu under date of January 22nd, 1907, as follows:

> "You are mistaken in thinking that I do not appreciate the regret that you feel in having to give your connection with the business, I appreciate it fully but, on the other hand, I realize, as you do not, the changes that have taken place in the business since your departure, now three years ago.
>
> There could never be a return to the old conditions, that is the conditions that prevailed while you were here. I would not consent to the substitution of the present Treasurer, Mr. MicGill, and the younger men have all come up in their positions and, without my consent, they could not be displaced from their positions.
>
> It is perfectly natural and, under the circumstances, a perfectly natural change that we have to recognize no matter what the regrets" (Tr. 140).

And learned counsel would persuade this Court that the man to whom those letters were written was so

necessary to the business of the writer of the letter that his loss could only be compensated by insurance!

Both Smith and Gignoux say that the insurance was taken out for the purpose of protecting the Company in the event of the death of any of its officers. Smith in the letter of September 25, 1907, says, "I required that all of the stockholders in *active service* with me should take out policies" (Tr. 159). Purdy in answer to interrogatory 11 (Tr. 249) says:

> "I asked Smith if he had come to a favorable decision in the mater of taking insurance on the lives of the *active members* of the corporation for the benefit of the corporation."

Rumsey was in *active service* only a few weeks to a few months after the policy was applied for. The exact time does not appear. He had ceased to be an officer of the company long before his death. He was not an officer at the time he determined to and did exercise his right to change the beneficiary. Half of his stock had been purchased by the Drug Company prior to that time, and the remainder was purchased by the Drug Company before the Drug Company brought its collusive suit against the Insurance Company for the amount of the policy. None of the purposes for which the policy has been variously said to have been taken out existed at the time the Drug Company collected from the Insurance Company. The Insurance Company was as well aware of this fact as the Drug Company.

The Record shows that Rumsey was an ordinary employee of the Drug Company, working for a mod-

erate salary; that his position could be filled by any drug clerk of ordinary ability; that when he severed his connection with the Company his place was promptly filled and the business of the corporation did not suffer by reason of his leaving the company. Smith in his letters to Rumsey strongly intimates that, on the contrary, the business was improved by the injection of younger and more vigorous blood. It does not appear that Rumsey possessed any special knowledge or qualifications necessary to the conduct of the business or any such qualification as would have caused any embarrassment to the Company in the event of his death. A corporation would have just as much right to insure the life of all its employees of every kind as this corporation had to insure the life of Mr. Rumsey.

## MISCELLANEOUS.

### Proofs of Death.

It is stipulated that Mrs. Rumsey made the only proofs of death ever presented to the Insurance Company. They were made on forms furnished by the Insurance Company. The Drug Company had no hesitation in availing itself of the proofs so made. In the complaint, in its "suit" against the Insurance Company, appears this allegation that "*the defendant corporation had due notice and proofs of death of said Samuel L. Rumsey*" (Tr. 378). The Insurance Company was as ingenious in its admission as was the Drug Company in its allegation. The answer "admits that * * * due notice and proofs of the death of said insured were made to the defendant". Notwithstanding the fact that the Drug Company had taken advantage

of the proofs of the death of her husband furnished by Mrs. Rumsey the Drug Company in its answer in the case at bar meets appellant's allegation that she had furnished these proofs of the Insurance Company (Tr. 314) with the statement "that this respondent is ignorant, and is, therefore, unable to admit or deny the allegation, and leaves the petitioner to her proof thereof". This answer is sworn to by George W. Smith (Tr. 141).

These and other facts drew from the Trial Judge the comment:

> "Following the decision of the Supreme Court of Colorado, the Drug Company brought suit upon said policy, against the Insurance Company, in this court. The Insurance Company answered setting up, in substance, the history of the Colorado litigation, and asking that the present plaintiff be made a party to the action (341). A trial was had in this court, jury waived, but no evidence was introduced on behalf of the defendant Insurance Company, to substantiate any of the allegations of the answer. It is true that a number of letters and other documents were 'filed for identification' which, if they had been regularly introduced and read in evidence, might have had the effect of procuring an order to bring in the present plaintiff as a party to the action,—though such a result may be considered as at least doubtful. Judgment passed in favor of the Drug Company for the full amount of the policy and interest, and that judgment has been paid.
>
> I am disposed to regard the action of the Drug Company against the Insurance Company, so prosecuted to judgment in this court, as hav-

ing been a collusive action. Although it was alleged in the answer of the defendant therein that the present plaintiff then was, as she had theretofore been, and has ever since continued, a claimant to the amount represented by the policy, yet no actual proof of those facts was adduced or offered, and nothing in effect appears to have been shown to the court except the policy itself, continuous payment of premiums by the Drug Company, and the death of Rumsey, whereby, upon the face of the record, as thus exhibited, the Drug Company became and was entitled to judgment.

But all parties concerned then well knew that this plaintiff was a claimant to the fund represented by said policy, and it is impossible to avoid the conclusion that the Drug Company, in particular (the Insurance Company, as above suggested, being unconcerned in the result, further than to obtain a judgment which might operate as a warrant to pay the amount of the policy to the Drug Company), sedulously and inequitably avoided any and all action which might have resulted in the intervention of the present plaintiff as a party to said action" (Tr. 429-431).

**Memorandum of Terms of the Policy in Relation to an Absolute Beneficiary.**

The insured may at any time by written notice to the Company at the home office declare any beneficiary * * * to be an absolute beneficiary under this policy. No * * * declaration of an absolute beneficiary shall take effect until endorsed on this policy by the Company at its home office. During the lifetime of any absolute beneficiary the right to revoke or change the interest of that beneficiary will not exist in the insured.

If any * * * absolute beneficiary dies before the insured the interest of such beneficiary will become payable to the executors, administrators and assigns of the insured.

**Chronology of More Important Facts.**

Insurance applied for in June, 1903.
Left the Territory in January, 1904.
Ceased to draw salary October, 1904.
Resigned as Treasurer February, 1905.
Married complainant herein August 31, 1905.
Sent notice to Drug Company of intention to change beneficiary in favor of wife shortly after Marriage, 1905.
Rumsey sold 100 shares Benson, Smith & Company stock to Mrs. Rumsey, July, 1907, and so notified the Company.
Mr. Rumsey changed beneficiary to Mrs. Rumsey, July 10, 1907. Change was filed with Insurance Company and Drug Company notified.
Mr. and Mrs. Rumsey gave option on the Rumsey stock in the Drug Company and sold 50 shares stock to Benson, Smith & Company, July, 1907, under said option.
New York Life Insurance Company accepted premium of $232.30 from complainant herein June 11, 1910.
Mr. Rumsey died July, 1910.
Mrs. Rumsey made Proof of Death, August, 1910.
Mrs. Rumsey commenced suit in Colorado, August, 1910.
Mrs. Rumsey sold balance of stock, 50 shares, to Benson, Smith & Company, January 12, 1911.
Mrs. Rumsey brought the present suit in Honolulu, June, 1915.

### The Law of the Case.

Broad fundamental principles alone are involved.

There is nothing either technical or difficult.

There is no case reported in the books which furnishes a basis for the judgment of the Territorial Supreme Court.

Certainly no basis is found in the cases cited in the Opinion of that Court.

The Stipulation of Facts recites that Mr. McIntosh, General Counsel for the Insurance Company, was willing to swear that the law is set out in

*Olmstead* vs. *Keyes,* 85 N. Y. 593.

The opinion in that case is printed in the record, commencing Page 386.

The real question involved there was a surviving husband's right to the choses in action of his deceased wife (see p. 395). The whole of the case is embraced in the concluding paragraph printed on Page 401 of the transcript.

The husband had taken out insurance on his own life for the benefit of his wife, but in the name of a trustee.

The wife having died, and the husband having married again, by appropriate proceedings the second wife was made *cestui qui trust,* and the real controversy was between her and the children of the first wife. The right of the second wife to the proceeds of the policy was upheld, *on the ground that the husband had absolute disposition over the choses in action of the deceased wife.* How this case could be supposed to sustain the proposition that the head of this Honolulu Drug Com-

pany could compel his subordinates to take out insurance for the purpose of providing a fund to buy their stock when they should die, or for any other of the changeling and fugitive purposes which are, in the record, ascribed as the reasons of the Drug Company for taking out the insurance, is beyond our comprehension.

The fields of insurance law must, indeed, have been found barren of authorities supporting the position of appellees, when they are compelled to resort to the case cited and are so pertinacious about it that they insist upon having it set out in the Stipulation of Facts as the legal foundation of their claim.

The New York Court gave the proceeds of the insurance policy to the widow of the deceased.

The Trial Judge did the same thing.

The Territorial Supreme Court reversed the Trial Judge, but there is nothing in *Olmstead* vs. *Keyes* which warrants such reversal.

We are in entire harmony with the thought of Mr. Justice Earle, expressed in *Olmstead* vs. *Keyes.* We approve of it from a moral, from an equitable and from a legal standpoint.

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The Territorial Supreme Court apparently attempts to justify its opinion by a quotation from

*Grigsby* vs. *Russell,* 222 U. S. 149, 154,

but being able to do so, undertakes to extend upon that decision, in a manner wholly unwarranted by anything contained in the opinion of Mr. Justice Holmes.

In the quotation from that Opinion found in the

Transcript (pp. 448-449) this language is used in referring to the assignment of the policy involved in the case:

> "The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance—upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. * * * So far as reasonable safety permits it is desirable to give life policies the ordinary characteristics of property."

*"The danger that might arise from a general license to all to insure whom they like", is the very danger which will exist if the Courts shall tolerate transactions such as shown by the facts in the case at bar.*

The United States Supreme Court says in the case cited

> "cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith",

and adds that *Warnock* vs. *Davis,* 104 U. S. 775, is one of the strongest of the type of cases referred to.

The next authority cited, Vance on Insurance, p. 129, is not applicable, as in the case at bar there is no evidence showing that the Drug Company had any reason to expect any special benefit from the continuation of the life of Rumsey. And Vance in stating that there is an insurable interest wherever the assured has a reasonable expectation of deriving benefit from the

continuation of the life of the insured, refers to cases where the assured had some special interest in the life of the insured,—such as an old faithful servant, or an officer of the corporation who is absolutely indispensable to the conduct of its business, etc., but did not include an ordinary drug clerk of a corporation, whose official position was merely a matter of form in order to comply with the corporation laws. The same is true of May on Insurance, Sec. 76; and 25 Cyc. 706, cited.

It needs but a statement of the facts in

*Conn. M. L. Ins. Co.* vs. *Schaefer,* 94 U. S. 457-460,

to show that it cannot possibly be authority, in principle any more than in fact, for the decision of the Territorial Supreme Court. We beg to quote the first paragraph of the Opinion of Mr. Justice Bradley found on the title page of the Case:

> "This was an action on a policy of life assurance issued July 25, 1868, on the joint lives of George F. and Franzisca Schaefer, then husband and wife, payable to the survivor on the death of either. In January, 1870, they were divorced and alimony was decreed and paid to the wife. There was never any issue of the marriage. They both subsequently married again, after which, in February, 1871, George F. Schaefer died. This action was brought by Franzisca, the survivor."

First let it be noted that the Insurance Company was endeavoring to escape liability upon its policy altogether, and made points which are denounced in the opinion as "frivolous".

Even in such case Mr. Justice Bradley says that

> "the point relating to alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it".

And continues:

> "A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him."
>
> * * * * *
>
> *"The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."* (Italics ours.)

And he quotes from Chief Justice Shaw:

> "All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another."

Justice Bradley continues:

> "Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred."

Opinions must always be construed with reference to the facts of the case in which they were delivered.

Adopting this rule there is nothing in the Schaefer case which warrants a decision against the appellant in the case at bar.

In the case of *Warnock* v. *Davis,* 104 U. S. 775, cited, Chief Justice Field said:

> "If the insured is under a moral obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former."

It certainly cannot be contended in the case at bar that Rumsey was under moral obligation to render assistance to the Drug Company. Rumsey was paid a salary for what he did, and he rendered valuable services for the salary, and was under no obligation whatsoever to the Drug Company. Hence the case is not in point.

It seems strange indeed that the Supreme Court should cite, in support of its decision in denying this insurance money to the widow of the insured and giving it to the Drug Company, this statement:

> "It is not even necessary that kinship shall exist between the parties if the insured is under a *moral* obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former" (Tr. 452).
>
> *Thomas* v. *Nat. Ben. Assn.,* 84 N. J. L. 281, 282.

> "One not the wife, child, parent, brother, sister or creditor of insured may have an insurable interest in his life." *Kentucky Life & Acc.*

**Our Courts, both Federal and State, have consistently and universally held that it is against public policy for any person or corporation to become the owner of insurance upon the life of a human being, where there is no insurable interest; and in support of that doctrine we cite the following selected cases:**

We beg the Court to remember that in the case at bar the insured did not take out the policy on his life for the benefit of the Corporation, but the Corporation took out the policy on the life of the insured for its own benefit. The insured had no more to say about the transaction than a hitching post had about what should be hitched to it in the days when hitching posts occupied their own important place in civilized society.

In the case of *Victor* vs. *Louise Cotton Mills,* 61 S. E. 648 (16 L. R. A. (NS) 1020), the court said:

> "A manufacturing company has no implied power to insure the life of its president and carry the policy after he has retired from office."

This case is especially in point, as our contention is that even if the Drug Company had an insurable interest in the life of Rumsey at the time he insured his life, that interest ceased when Rumsey resigned as treasurer and vice-president of the Company. Of course, we contend that Drug Company never at any time had an insurable interest in the life of Rumsey.

In the case of *Cheeves* v. *Anders, Admr.,* 87 Tex. 287, the court held that want of insurable interest is just as absolute where it has ceased as where it never existed. Interest in a policy upon one member of a partnership held by the firm ceased upon the dissolution of such firm and the survivor has no interest in the

recovery. In the case above cited, Chilton insured his life in favor of Cheeves, who was his copartner, but prior to Chilton's death he sold all of his interest in the copartnership to Cheeves and, upon his death, the court held that Cheeves had no interest in the policy—Chilton having sold his interest in the copartnership prior to his death. In other words, that the insurable interest which Cheeves had in Chilton's life at the time they were copartners, ceased upon the dissolution of the copartnership by the sale of Chilton to Cheeves.

There is a clear distinction between a corporation insuring the life of its stockholders and officers and a partner insuring his life for the benefit of a copartner. *We have been unable to find any case upholding a policy taken out by a corporation on the life of a stockholder* and that, as we have shown, is the case before this Court. There is no case upholding life insurance taken out by a Corporation upon the life of an officer, under circumstances such as are disclosed here.

There is no case upholding such insurance, except cases *where the officer took out the insurance himself* for the benefit of the corporation *and where the officer was in addition indispensable to the corporation, and the corporation would suffer great damage by reason of the officer's death.* The Drug Company never attempted to show that Mr. Rumsey's connection with the Company was such as to make it indispensable or that it was even of any special value. The facts show conclusively that it was neither.

The question of an insurable interest is discussed very thoroughly in the case of *Ruse* vs. *Mutual Benefit Life Ins. Co.,* 23 N. Y. 516, 523, 527, wherein the court holds that at common law wager policies are void.

In the case of *Tate* vs. *Commercial Bldg. Assn.,* 97 Va. 74, 77, 82, the court holds that an assignee of a policy, having no insurable interest in the life of the insured, can only retain so much of the proceeds, when the insurance was lawfully effected, as is necessary to reimburse him for the premiums paid, expenses incurred and interest thereon (p. 78). So the only possible interest that Drug Company could have in the Rumsey policy would be the amount of the premiums paid by that Company. This is the decree of the trial Court * * *. It certainly would not under any theory be entitled to anything more.

In the case of *Gilbert* vs. *Moose,* 104 Pa. St. 74; 49 Am. Rep. 570, the court holds that where a party insures his life in favor of a stranger and the stranger assigns the policy to a third party for a valuable consideration, the heirs of the insured are entitled to the policy and not the assignee, as neither the assignee or the original beneficiary had any insurable interest in the insured.

In the case of *Schlamp* vs. *Berner's Admrs.,* 51 S. W. 312, the court held:

> "The assignment of a policy of life insurance to one who has no insurable interest in the life insured, is void as against public policy."

In the case of *Wilton* vs. *New York Life Insurance Co.,* 78 S. W. 403, the court holds:

> "There can be no recovery on a life policy by one having no insurable interest in the life insured to whom the policy was assigned after its issuance."

In the case of *Dugger* vs. *Mutual Life Insurance Co. of New York,* 81 S. W. 35, it is held that:

> "One to whom insured assigns his life policy, not being a relative of insured and not alleging an insurable interest in the life of insured or in the policy, may not recover thereon."

In the case of *Franklin Life Insurance Co.* vs. *Hazzard,* 41 Ind. 116, it is held:

> "A person cannot purchase and hold for his own benefit, as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest."

The same is held in the case of *Heusner* vs. *Mutual Life Insurance Co.,* 47 Mo. App. 336.

In the case of *Quillian* vs. *Johnson,* 49 S. E. 801, it is held:

> "Irrespective of whether the holder of a policy of insurance on his own life may legally sell and assign the policy to one having no insurable interest in his life, the policy holder is certainly not at liberty to make the policy the subject matter of a purely wagering and speculative contract between himself and a person having no interest therein."

Certainly the Drug Company had no legal or moral right to insure the life of Mr. Rumsey in order that it might purchase his stock in the event of his death. Mr. Rumsey paid a valuable consideration for his stock and he was *under no obligation to provide funds for the Drug Company with which to purchase it at his death. If such insurance contracts were not*

*against public policy and void,* all corporations would insure the lives of all their officers and directors as it would be a good business proposition and a protection to the corporation. A corporation certainly has no more right to speculate on the life of one of its stockholders than an individual would have to speculate on the life of some stranger. Only under the most extraordinary circumstances have any courts ever held that a corporation has such an insurable interest in its officers or stockholders as to warrant it in insuring their lives.

It is also well settled that a creditor to whom a debtor sells a policy of life insurance on his life, acquired no interest therein beyond the debt which it was transferred to secure, as beyond this, the creditor had no insurable interest in the life of the insured.

*Barbour's Administrator* vs. *Larue,* 106 Ky. 546.

Consequently, we do not see how the Drug Company, Limited, can contend that it had any interest whatever in the insurance policy of Mr. Rumsey—even if it had an insurable interest at the time the insurance policy was taken out—other than to the extent of the premium paid by it.

The following cases are all along the same line as those we have above cited:

*Schonfield* v. *Turner,* 75 Tex. 324, 329, 330;

*Gordon* v. *Ware Nat. Bank,* 132 Fed. 444, 445, 450;

*Trinity College* v. *Travelers Ins. Co.,* 113 N. C. 244, 248;

*Helmetag's Admr.* v. *Miller,* 76 Ala. 183, 186, 188;

*Continental Life Ins. Co.* v. *Volger,* 98 Ind. 572;

*Missouri Valley Life Ins. Co.* v. *Sturges,* 18 Kan. 93-97.

We respectfully submit that the Judgment of the Territorial Supreme Court should be reversed and the judgment of the Circuit Court of the First Judicial Circuit of the Territory affirmed.

LORRIN ANDREWS,
W. B. PITMAN,
Attorneys for Appellant.

T. J. O'DONNELL,
Of Counsel.